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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

19 Cr. 374 (JMF)

5 MICHAEL AVENATTI,

6 Defendant.

Trial

7 -----x

8 New York, N.Y.
9 February 4, 2022
9:00 a.m.

10 Before:

11 HON. JESSE M. FURMAN,

12 District Judge
13 -and a Jury-

14 APPEARANCES

15 DAMIAN WILLIAMS

16 United States Attorney for the
17 Southern District of New York

18 BY: MATTHEW D. PODOLSKY

19 ROBERT B. SOBELMAN

20 ANDREW A. ROHRBACH

21 Assistant United States Attorneys

22 MICHAEL AVENATTI, Defendant *Pro Se*

23 DAVID E. PATTON

24 Federal Defenders of New York, Inc.
25 Attorney for Defendant

BY: ROBERT M. BAUM

ANDREW J. DALACK

TAMARA L. GIWA

Standby Assistant Federal Defenders

Also Present: Special Agent DeLeassa Penland

U.S. Attorney's Office

Christopher de Grandpre, Paralegal Specialist

Juliet Vicari, Paralegal

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(Trial resumed; jury not present)

THE COURT: Good morning. Welcome back.

The government is present. Mr. Avenatti is present.

Standby counsel is present.

As you, I think, know, we have received a third jury note. I will mark it Court Exhibit 3. It reads as follows:

"We have one juror who is refusing to look at evidence and is acting on a feeling. We need assistance on moving forward. She does not believe she needs to prove her side using evidence and refuses to show us how she has come to her conclusion. Please -- underlined -- help us move forward. Not going on any evidence, all emotions and does not understand this job of a jury."

Dated today, February 4, at 10:02 a.m.

I provided, through my deputy, a potential response for your consideration. I am certainly open to alternative suggestions. I am not wedded to this.

Government.

MR. PODOLSKY: Yes, your Honor.

First I will say, and I am happy to go through it, but I think there has now been an extensive record, and particularly based on this last note, that there is a juror who is not deliberating. What we would suggest in lieu of an instruction, particularly given the strength of this last note, the similarities to what happened in *Baker*, and the underlined

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1 request for assistance, would be to send back a note to the
2 jury, consistent with *Baker*, ask the foreperson to identify the
3 juror, to confirm that the note that was sent was on behalf of
4 the other 11 deliberating jurors, and in the meanwhile we could
5 discuss and consider what further inquiry, if any, should be
6 made of that juror, or other jurors, what form that might take,
7 and then ultimately whether the juror should be excused for
8 refusing to deliberate, which *Baker* and other cases make clear
9 is well within Court's discretion, and, frankly, should happen
10 when a juror refuses to deliberate.

11 THE COURT: I guess, initial reaction, and then I will
12 hear again from you and then from Mr. Avenatti.

13 I am disinclined to only do that. One possibility is
14 giving some version of this instruction, which underscores the
15 duty to deliberate requires consideration of the evidence, and
16 the jurors should not let themselves be swayed by sympathy or
17 emotion. That directly responds to the note and perhaps would
18 do the trick.

19 I suppose one possibility is to give some version of
20 this instruction and say, if, after continuing to deliberate,
21 you continue to have this problem, please let us know, confirm
22 this is on behalf of 11 of the 12 of you, and please identify
23 the juror in question. I guess I am disinclined to do that
24 now. Reading *Baker*, you are certainly correct that the court
25 handled it that way, but it did so after receiving three notes

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1 with respect to this issue. Here, we have only one. Granted,
2 we have yesterday's note indicating that they couldn't reach a
3 consensus, but we don't know if that was the same lineup and
4 same situation or not, and it was quite early in the jury's
5 deliberations.

6 So I guess I am a little bit reluctant to ask them to
7 name names immediately, on the theory that we don't know a
8 whole lot yet and that that would really sort of put the
9 screws, so to speak, on the one juror, and without knowing
10 more, whether it's a refusal to deliberate, as the note
11 suggests, versus a conscientious belief that the evidence
12 supports the conclusion that she has reached, that we should be
13 a little hesitant to do more than what I am proposing.

14 MR. PODOLSKY: If I may, your Honor.

15 Let me analogize it to *Baker*. In *Baker*, there was a
16 note received within a few hours of the beginning of
17 deliberations. It is true that that note referenced that one
18 juror has a feeling and refuses to deliberate, but I think
19 there is an analogy here in a way that is quite unusual.
20 Within only a few hours of the beginning of deliberations, the
21 jurors expressed an inability to reach consensus. Following
22 that, the jurors asked a legal question, which we have
23 discussed, and they asked for a transcript in evidence. Within
24 an hour this morning, approximately, this note came, which I
25 think strongly indicates that that juror was refusing to look

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1 at the 300 pages of evidence that were provided. And, most
2 importantly, the note that was sent this morning, as I read it,
3 is stronger than anything that was said in *Baker*, and it is
4 very clear and doesn't admit really any other interpretation
5 than that this juror is refusing to deliberate.

6 So we do think following *Baker* it would be appropriate
7 to have an inquiry here. And, in particular -- and if we end
8 up going the route of an instruction, I am happy to talk about
9 that in a moment -- my concern generally in just instructing
10 them is somewhat analogous to yesterday. What I would fear is
11 jurors, frankly, pleading for help, with an underlined
12 "please," and then receiving simply an instruction, and then
13 feeling like there is no help, when help is available if a
14 juror is refusing to deliberate.

15 THE COURT: I am not sure I agree with the assertion
16 that this is a stronger letter than in *Baker*. Again, there
17 were three notes in *Baker* -- not letter -- three notes in
18 *Baker*, and they were pretty strongly worded there. So I am not
19 sure that's accurate.

20 Mr. Avenatti, your views, please.

21 MR. AVENATTI: Yes, your Honor. Good morning.

22 A few points. Number one, your Honor, I object to any
23 further instructions of the jury at this time. It is obvious
24 that the jury is deadlocked, and I am requesting that the Court
25 declare a mistrial, and I would like to explain why.

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1 Your Honor, this note cannot be read in isolation. It
2 has to be read in conjunction with the other notes that have
3 been received by the Court over the last two days. We are in
4 the third day of jury deliberations at this point, as the Court
5 is well aware. This note does not say that this juror has
6 refused to deliberate. Obviously, this is the first we are
7 hearing of the complaints contained in the note. We can infer
8 that this juror in fact did deliberate on Wednesday and
9 Thursday. There were no complaints made relating to this juror
10 at any point in time prior to this morning. We can also infer
11 that this juror obviously has deliberated for two days now, and
12 she has reached a conclusion. She doesn't have to explain that
13 conclusion to anyone. She doesn't have to justify that
14 conclusion to any other juror. She, like the other jurors,
15 reviewed the evidence and the testimony during the trial, and
16 again, all indications are that she was cooperative and
17 deliberated for at least two days. There is no basis to remove
18 the juror. There is no basis to try to coerce the juror.
19 There is no basis to try to single out this juror.

20 This is nothing like the situation in *Baker*. In
21 *Baker*, it was clear that the juror was refusing to deliberate,
22 and, in fact, had made up his or her mind before deliberations
23 even began. There is no evidence in this situation that this
24 juror did anything like the juror in *Baker*. This jury gave a
25 note to the Court yesterday morning stating that they could not

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1 reach a consensus as to Count One. Your Honor gave a
2 significant modified *Allen* charge. That charge included the
3 following language at lines 14 through 17: "At the same time,
4 no juror should surrender his or her honest conviction as to
5 the weight or the effect of the evidence to his fellow or her
6 fellow jurors or for the purpose of returning a verdict; it is
7 your right to fail to agree if your honest conviction requires
8 it."

9 Your Honor, all indications are that this juror did
10 exactly what you instructed. This juror exercised that very
11 right that you told this juror she had. But she is unwilling
12 to change her position. That is not grounds to attempt to
13 coerce this juror, question the juror, single out the juror.
14 It just simply is not. And for those reasons, I am requesting
15 a mistrial. And I would like to cite the Court to a case
16 decided by Judge McMahon, *U.S. v. Samet*, S-A-M-E-T, 207 F.Supp.
17 269. In that decision, Judge McMahon decided that a mistrial
18 rather than a potential dismissal of a juror was required.

19 I would also like to bring to the Court's attention
20 that this juror may decline to deliberate further, although
21 there is no indication that that's actually happening, for
22 perfectly appropriate reasons, including being threatened, a
23 feeling of coercion, or any number of other reasons. In fact,
24 there is an 11th Circuit case, *U.S. v. Brown*, that decided that
25 it's not proper to strike a juror because the juror has reached

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1 a decision based on religious grounds.

2 So the idea that somehow this juror, again, has to
3 justify her position to the other jurors, and that her failure
4 to do so somehow constitutes improper conduct, or misconduct,
5 or a failure to deliberate, is without merit, your Honor. This
6 jury has been at this now for, we are on day three. It is
7 obvious this jury is deadlocked. Any further instruction to
8 the jury would constitute coercion and be improper. For each
9 of those reasons, your Honor, I am requesting that the Court
10 declare a mistrial.

11 THE COURT: Can you repeat the cite to *Samet*, please,
12 just since I would like to look at it, and I will get back to
13 you.

14 MR. AVENATTI: 207 F.Supp. 269. I can try to get a
15 year. Perhaps Mr. Dalack can be so kind as to give us a year.

16 THE COURT: Assuming the citation is accurate, I don't
17 think we need the year.

18 MR. AVENATTI: 2002 case, your Honor.

19 Your Honor, one moment, please.

20 Your Honor, that's my position at this time.
21 Depending on what the Court does next, obviously I would like
22 to be heard further, but I am going to leave it there for now.

23 THE COURT: I would like to just look at *Samet* before
24 I respond. So I am trying to get it, but bear with me.

25 (Pause)

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1 THE COURT: That application is denied. I don't think
2 we are anywhere near having to declare a mistrial. I do read
3 this note to suggest that there is a juror who is refusing to
4 deliberate. It doesn't suggest in any way, shape or form to me
5 that this juror holds a conscientious belief based on the
6 evidence. To the contrary, it states explicitly that the juror
7 is refusing to look at the evidence and acting on a feeling,
8 that it's all emotions and so forth. So it seems to me that
9 this implicates squarely the circumstances in *Baker, Thomas*,
10 and the like. For the reasons I stated earlier, I am not
11 inclined at this point to go the *Baker* route of asking the jury
12 to identify who the juror is, but I think a more deliberate and
13 incremental approach is more appropriate. We may get there,
14 and if we get there, we may learn that this juror's views are
15 rooted in evidence and it's simply a different way of looking
16 at it, in which case we might be in mistrial territory, but I
17 don't think we are there yet.

18 So let's turn to my proposal and your suggestions for
19 amending or changing or substituting something else.

20 Mr. Podolsky.

21 MR. PODOLSKY: We have no objection to the content of
22 the instruction, but we do think it would be appropriate, given
23 the content of the letter, to add at the end something to the
24 effect of, if a juror continues to refuse to deliberate in a
25 manner that I have described, you may provide me with a further

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1 note. We could either tell them to identify the juror or not
2 at this point, but I think it should be clear to the jury that
3 they are able to have further discussion with the Court on this
4 matter, if necessary, rather than walk away with the impression
5 that there is nothing to do other than read the instruction
6 back to them.

7 THE COURT: OK. Hang on one second.

8 All right. I am inclined to think that makes sense,
9 but obviously I will give Mr. Avenatti an opportunity to be
10 heard.

11 I also had a few other minor tweaks to what I would
12 propose. So what I am going to do is actually ask Ms. Smallman
13 to print a redline that shows the edits that I have made for
14 both sides, and then we can use that as the basis for our
15 discussion.

16 MR. AVENATTI: Could I be heard because my request is
17 different than your proposed instruction?

18 THE COURT: Sure. While we are waiting for the
19 printing, sure, go ahead.

20 MR. AVENATTI: Thank you, your Honor.

21 In light of your Honor's denial, the request that I
22 would make in the alternative is that the Court simply bring
23 the jurors up and reread to the jurors lines 6 through 18 of
24 the original charge under duty to deliberate. Nothing
25 more -- well, actually, with one addition, which is a

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1 reiteration of the burden of proof and reasonable doubt. And
2 the reason for that is, your Honor, because this note seems to
3 suggest that the jury may be operating under a misunderstanding
4 relating to the fact of what my burden is in this case, which
5 is zero. So that is my first request in the alternative.

6 The second request, or my second alternative request,
7 if the Court is not willing to do that --

8 THE COURT: Let me ask you, do you think there is
9 anything in my instructions that is an inaccurate statement?
10 95 percent of them are drawn from my original charge, and I
11 think the other 5 percent are almost verbatim out of *Baker*. So
12 is there anything that you think is legally wrong or inaccurate
13 or prejudicial about this?

14 MR. AVENATTI: Yes.

15 Lines 11 through 13, your Honor, are highly
16 prejudicial, and appears to be an effort to convince
17 potentially a hold-out juror for acquittal that she should
18 change her vote to convict.

19 THE COURT: Is it your position that the juror should
20 let sympathy or emotion interfere with clear thinking? Because
21 I don't think that's the law, and indeed, it's inconsistent
22 with the instructions that I have already given to the jury,
23 which state almost verbatim exactly that.

24 MR. AVENATTI: Then why is it necessary to emphasize
25 this again, your Honor? It's not necessary at all. There are

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1 a number of things in the original charge that I would like the
2 Court to reemphasize, especially at this sensitive time. I
3 doubt the Court will entertain that. So again, putting this
4 language in this charge at this --

5 THE COURT: Mr. Avenatti, the reason is it is directly
6 responsive to a note. And you seem to be operating on the
7 assumption that the one hold-out is holding out for acquittal.
8 I don't know that to be the case. For all I know, 11 jurors
9 are in favor of acquittal and the one who is allegedly being
10 swayed by emotion is in favor of conviction. So I don't think
11 that the premise of your objection is even accurate. I think
12 it is accurate to tell the jury, and directly responsive to
13 their note, to say that the duty to deliberate requires you to
14 consider the evidence; it requires you not to be swayed by
15 emotion, it requires you not to be swayed by sympathy. That is
16 both a repetition of what I have already instructed them. It's
17 also an accurate statement of the law.

18 MR. AVENATTI: Your Honor, then I would ask that the
19 Court reread the "bias or sympathy as a juror" instruction in
20 its entirety, together with the "duty to deliberate"
21 instruction. So pages 33 and 34, your Honor.

22 THE COURT: But that's not responsive to the note. My
23 question again, is there anything legally inaccurate or
24 prejudicial about the draft instruction that I have given you?

25 Ms. Smallman, did you print the redline version?

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1 MR. AVENATTI: Can I have a moment to confer with my
2 advisory counsel, please?

3 THE COURT: You may.

4 (Defense counsel confer)

5 THE COURT: All right. Can we proceed? It's been an
6 hour and a half since the jury sent this note. I recognize
7 that much of that time was spent with me trying to consider the
8 right approach in drafting something, but I also do want to
9 respond to the note and respond to it before the jury takes its
10 lunch.

11 Let me say two things, just by way of making more of a
12 record on the mistrial application.

13 First of all, *Samet* is F.Supp.2d, just for the record.
14 I wanted to clarify that.

15 Second, Mr. Avenatti referenced that this is the third
16 day of jury deliberations. That's technically correct, but in
17 actual fact, the jury I don't think has deliberated much more
18 than a day and a half at most. Yesterday was a full day of
19 deliberations, but the jury deliberated for two hours and ten
20 minutes on Wednesday when they got the case, and had
21 deliberated for only an hour when we received this note. So it
22 really amounts to about a day and a half. Moreover, they don't
23 deliberate when they have lunch because their social distancing
24 doesn't permit them to do so. So in that regard, to suggest
25 that we are three days into deliberations is not an accurate

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1 statement of where we are.

2 With that, let's turn to my proposal, and I am happy
3 to take suggestions. To the extent that you think it is an
4 inaccurate statement of the law, first of all, that would
5 surprise me since it comes, again, almost verbatim from my
6 original instructions. You can certainly make a record on
7 that, and if you think it's prejudicial in some way, you can
8 make a record on that.

9 Government.

10 MR. PODOLSKY: No, your Honor. We think this is
11 accurate. The only thing we might suggest, if the Court thinks
12 it's helpful, is to provide them with a written version to
13 accompany the written instructions they have.

14 THE COURT: Mr. Avenatti.

15 MR. AVENATTI: Your Honor, I have the following
16 objections to the proposed draft response.

17 First of all, within the paragraph that begins at line
18 8 through 14, sympathy and emotion are referenced twice. I
19 think that's undue emphasis on that particular point.

20 In place of this paragraph 8 through 14, I would ask
21 that the Court use the original charge paragraph at lines 7
22 through 10 on page 33. For the record, that language reads as
23 follows: "Indeed, under your oath as jurors, you are not be
24 swayed by bias --"

25 THE COURT: Mr. Avenatti, it's in the record. You

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1 don't need to read it. So keep going.

2 MR. AVENATTI: Including the last sentence, "Has the
3 government proved each element beyond a reasonable doubt?"

4 I am also requesting that after that language, the
5 following language be included: "But I must remind you that
6 Mr. Avenatti has no burden to come forward with any evidence.
7 The burden in this case lies entirely with the government."

8 THE COURT: This is after what language? What line
9 are we in now?

10 MR. AVENATTI: After 14, your Honor, but my request is
11 that 7 through 10 from the original charge be put in place of 8
12 through 14, and then the language that I just proposed be
13 added. If the Court is unwilling to replace the paragraph, I
14 am asking that this language be added.

15 THE COURT: OK.

16 MR. AVENATTI: Furthermore, your Honor, I object to
17 the inclusion of the language in the redline, at lines 24
18 through 27, because it is coercive and threatening. I don't
19 believe it's appropriate at this stage of the proceedings for
20 the Court to include this language because it can be taken as
21 no other way other than a threat and coercive. This jury has
22 already demonstrated an ability to send notes when there are
23 problems. There is nothing to suggest that that would not be
24 done again. There is no need to suggest to them that if
25 someone is refusing to deliberate, that they can come running

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1 to the Court and complain to the Court about it. They sent
2 this note this morning and I am confident that if there's any
3 further problems, they will inform all of us at that time.

4 Then, lastly, I would object to this instruction going
5 to the jury, just as I did on the other instructions, since
6 they began their deliberations and for the same reasons. There
7 is no need to bring yet -- yet bring further attention to this
8 particular instruction and make it any more important than all
9 the other instructions in the case.

10 If I could just have one moment, please.

11 Thank you, your Honor.

12 THE COURT: Give me a moment, please.

13 MR. AVENATTI: I had one other request. I'm sorry.

14 THE COURT: Go ahead.

15 MR. AVENATTI: In the event the Court is not willing
16 to replace the paragraph as I have requested, I would
17 respectfully ask your Honor to include language similar to that
18 at lines 9 and 10 of the original charge relating to the
19 government's burden to prove each element beyond a reasonable
20 doubt.

21 THE COURT: All right. I think there are a bunch of
22 things out there. Let me see if I can respond to all of them.

23 I am not going to materially change my proposal. I
24 think it's accurate. I think it's consistent with my earlier
25 instructions. I don't really understand Mr. Avenatti's

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1 objection to the use of the word "sympathy." First of all, it
2 is an accurate statement of the law. Second of all, it's
3 consistent with my prior instructions. Third of all, the bias
4 or sympathy charge that he requested that I add here uses the
5 word "sympathy" I think three times, by my count. So in that
6 regard, his requests are internally inconsistent.

7 I don't think that anything in this charge is coercive
8 or -- I don't think it's coercive. I think it merely reminds
9 them what the duty to deliberate entails and tells them to keep
10 at it. So I think it's perfectly proper.

11 I am going to make a couple of changes, and I am going
12 to accept the government's suggestion of providing a copy of
13 this instruction, as well as the good faith instruction from
14 yesterday, to the jury, in no small part because I want to
15 underscore to them that they should consider all of my
16 instructions together. So I think that that makes sense so as
17 not to give undue weight to any of my instructions. I am happy
18 to include the modified *Allen* charge as well, but I am open to
19 your suggestions on that.

20 Here are the changes that I propose to make to the
21 most recent version that you have there.

22 First, I would propose to start a new paragraph with
23 "your verdict must be based on the evidence introduced at trial
24 or the lack of evidence," and then add the following sentence
25 in response to one of Mr. Avenatti's requests: "But I remind

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1 you: The defendant has no burden to present any evidence. As
2 I have told you many times, the burden of proof lies solely
3 with the government."

4 And then at the end, where I say, "With that, I will
5 ask you to return to the jury room to continue your
6 deliberations," I propose adding, "I am going to give you
7 copies of the instruction that I just read to you, as well as
8 the instruction I read to you yesterday in response to your
9 second note. You should consider both instructions along with
10 all of my other instructions in reaching a verdict in this
11 case."

12 Any objection from the government?

13 MR. PODOLSKY: Certainly no objection to the
14 correctness of anything. I would just note, on the inclusion
15 of another reference to the burden of proof, it has been not
16 only multiple times in the initial instructions, it's in the
17 *Allen* charge, I believe it was in the good faith instruction as
18 well, and the jury expressed no confusion on this. I am not
19 sure why we are injecting it into a charge which is explaining
20 to the jury their responsibilities to deliberate.

21 THE COURT: I certainly understand that, but given
22 that we are in sensitive territory, as *Thomas* and *Baker* make
23 clear, and it's necessary to distinguish between somebody
24 holding out because of a different view of the evidence, I
25 think it does make sense to remind them. It certainly doesn't

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1 do any harm and is an accurate statement of the law.

2 Mr. Avenatti, any comments on those proposed changes?

3 MR. AVENATTI: Well, obviously, your Honor, I want the
4 record to be clear I am not waiving any objections I have
5 previously made, and I am reaffirming those now.

6 With that understanding, I am requesting that after
7 the words "entirely with the government," that the instruction
8 read, "that burden requires the government to prove each
9 element beyond a reasonable doubt." That is an accurate
10 statement of the law and it goes hand in hand with the burden.

11 THE COURT: I don't think that's necessary.

12 Any other objection?

13 MR. AVENATTI: Further, your Honor, in light of the
14 fact that the Court has overruled my objection to providing
15 this charge to the jury in hard copy, I would ask that all of
16 the instructions given to the jury be provided in hard copy at
17 the same time. So that would be this charge, the Allen charge,
18 and the good faith charge.

19 THE COURT: As I said, I am certainly open to that.

20 Mr. Podolsky.

21 MR. PODOLSKY: We have no objection to that.

22 THE COURT: All right. So I will modify the sentence
23 that I read as well to read: "As well as the instructions I
24 read to you yesterday in response to your first two notes. You
25 should consider all of these instructions along with all of my

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1 other instructions in reaching a verdict."

2 All right. Why don't we get the jury, and in the
3 meantime I will try to get all these things printed.

4 (Jury present; time noted: 11:55 a.m.)

5 THE COURT: You may be seated.

6 Welcome, ladies and gentlemen. Good morning to you
7 and thank you for being here on time to begin your
8 deliberations this morning.

9 We have received your note, which reads as follows:
10 "We have one juror who is refusing to look at evidence and is
11 acting on a feeling. We need assistance on moving forward.
12 She does not believe she needs to prove her side using evidence
13 and refuses to show us how she has come to her conclusion.
14 Please help us move forward. Not going on any evidence, all
15 emotions and does not understand this job of a jury."

16 At the beginning of this case, you each took an oath
17 to well and truly try this issue and a true verdict give
18 according to the law and the evidence.

19 Pursuant to that oath, each of you has a duty to
20 deliberate. That entails a duty to consult with one another,
21 to consider each other's views with an open mind, and to
22 discuss the evidence with the objective of reaching a just
23 verdict if you can do so.

24 Under your oath as jurors, you are not to be swayed by
25 sympathy or emotion. You should be guided solely by the

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1 evidence presented during the trial and the law as I gave it to
2 you, without regard to the consequences of your decision. You
3 have been chosen to try the issues of fact and reach a verdict
4 on the basis of the evidence or lack of evidence. If you let
5 sympathy or emotion interfere with your clear thinking, there
6 is a risk that you will not arrive at a just verdict. You must
7 make a fair and impartial decision so that you will arrive at a
8 just verdict.

9 Your verdict must be based on the evidence introduced
10 at trial or the lack of evidence. But I remind you the
11 defendant has no burden to present any evidence. As I have
12 told you many times, the burden of proof lies solely with the
13 government.

14 As you deliberate, you should examine the questions
15 put to you with candor and with a proper regard and deference
16 to the opinions of each other. If, after listening to your
17 fellow jurors, and if, after stating your own view, you become
18 convinced that your view is wrong, do not hesitate because of
19 stubbornness or pride to change your view. On the other hand,
20 if you have honest convictions and beliefs based on the
21 evidence presented at trial, you should not surrender those
22 convictions and beliefs solely because of the opinions of your
23 fellow jurors or because you are outnumbered.

24 I remind you that your verdict must be unanimous.
25 Further, you are reminded that, if at any time you are not in

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1 agreement, you are not to reveal the positions of the jurors,
2 including a split of the vote, to anyone, including me, at any
3 time during your deliberations.

4 With that, I will ask you to return to the jury room
5 to continue your deliberations. I am going to give you copies
6 of the instructions that I just read to you, as well as the
7 instructions I read to you yesterday in response to your first
8 two notes. You should consider all of these instructions along
9 with all of my other instructions in reaching a verdict in this
10 case. If, at any point in your deliberations, anyone on the
11 jury is refusing to deliberate in accordance with my
12 instructions, you are free to send us another note. And, of
13 course, if you have any additional questions or concerns, you
14 can always send us another note as well.

15 With that, I will have my deputy hand to Juror No. 1
16 the printed versions of the three instructions that I have
17 given you, and you may retire and continue your deliberations.
18 Thank you.

19 (Jury resumes deliberations)

20 THE COURT: You may be seated.

21 All right. Two other things while I have you.

22 First, while I declined the government's invitation to
23 give a supplemental charge on good faith, as I think I made
24 clear in my order, it may well be that an occasion arises where
25 clarity or further clarity is appropriate. So I would

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1 encourage you to think about that and keep an eye out for it.
2 I acknowledged that yesterday, but indicated my view that,
3 absent another note, it was likely somewhere between too late
4 and premature. I adhered to that position this morning in
5 ruling on the government's motion, but I am persuaded that
6 there may be some confusion on that issue; and so, if the
7 opening arises, based on further communications from the jury,
8 I think that that may well be warranted. So be prepared to
9 address that if or when it is appropriate.

10 Second, just one note on the defendant's other
11 application for a mistrial this morning with respect to Ms.
12 Daniels' interview. As I said, the application was frivolous.
13 There is no suggestion that any juror is aware of it. I
14 previously instructed them to disregard, avoid any news about
15 the case, so on and so forth, and no reason to think they
16 disregarded that. Moreover, there is no order in this case
17 preventing witnesses from saying anything, and would draw your
18 attention to local criminal rule 23.1 that addresses some of
19 these issues.

20 Having said that, I would urge the government, I don't
21 think you control Ms. Daniels per se, but she was a witness
22 that you called, and to the extent that you have any capacity
23 to influence her or speak to her counsel and urge her to be
24 aware of the sensitivities involved in a deliberating jury, I
25 think it would be behoove you to do so. Certainly, if she does

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1 go on an interview tour, it raises the prospects of a juror
2 learning about it, and that would certainly complicate things,
3 and I think all of us, including Ms. Daniels, have an interest
4 in avoiding a mistrial where we need to do this again. So
5 that's my thought.

6 MR. PODOLSKY: We have made those efforts, your Honor,
7 anticipating that issue. Certainly it's not something that we
8 want to arise. I will note the defendant makes comments on
9 this case almost every day to the press as he leaves the
10 courtroom, and I don't think those are any better. So I think
11 we should all be using our discretion in the way that we
12 respond to press inquiries.

13 THE COURT: I would urge both sides to read local
14 criminal rule 23.1, which does speak to these things and does
15 apply to lawyers and parties involved in the case. So no one
16 has made any application under that rule to me, no one has made
17 a motion to enter an order that would restrict witnesses from
18 making comments, so we are where we are, but you certainly
19 should be aware of those rules and the obligations that they
20 impose on both sides.

21 Yes, Mr. Avenatti.

22 MR. AVENATTI: Yes, your Honor. For the record, I
23 have complied at all times with 23.1 and any suggestion to the
24 contrary by the government is completely false. I have not
25 commented on the evidence in this case, and I most certainly

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1 have not commented on the jury deliberations. The interview
2 that was given this morning was outrageous, frankly, in
3 duration, accusations, and I understand the Court's ruling, I
4 respect it, but no one that I have consulted in connection with
5 this has ever seen anything like it, in a criminal case, to
6 have the complainant go on national television and say what she
7 said. I understand the Court's ruling.

8 I will also add that the government's complaints about
9 what I have said, I have maintained my innocence in this case
10 and I have repeatedly said that, and the last time I checked,
11 the First Amendment allows me to do just so. As a criminal
12 defendant, I am allowed to claim that I am innocent, which I
13 have done and which I continue to plan on doing in connection
14 with this case, your Honor.

15 THE COURT: Well, the government didn't make any
16 application under rule 23.1. I am simply admonishing both
17 sides to be mindful of the rule. I, for one, have not watched
18 any interviews -- I did watch Ms. Daniels' interview after it
19 was brought to my attention this morning. I have not watched
20 any of Mr. Avenatti's interviews, or whatever they may have
21 been. So if there is an application, I will take it up, but I
22 am really just urging you to make sure you're in compliance
23 with the rule.

24 Anything at this time?

25 MR. PODOLSKY: No, your Honor.

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1 THE COURT: Mr. Avenatti.

2 MR. AVENATTI: No, your Honor.

3 THE COURT: All right. If we get another note, I will
4 see you earlier. Otherwise, just a reminder that I will bring
5 them to the courtroom before I excuse them today, and that will
6 be at 4. So in that regard, you should certainly be here, if
7 we are not here earlier, by no later than 3:45, let's say, and
8 ready to bring them up and excuse them for the day.

9 Thank you and I will see you when I see you.

10 (Recess pending verdict)

11 THE COURT: You may be seated.

12 All right. Government is here. Mr. Avenatti is here.
13 Standby counsel is here.

14 I think you have been advised of this, but I have a
15 note here, signed by the foreperson, dated today, at 2:33 p.m.,
16 stating, "We have a verdict."

17 We will get the jury up and have them return the
18 verdict. I don't expect anything otherwise here, but obviously
19 just to underscore that I expect everybody to maintain decorum
20 and act professionally regardless of what the verdict is, and
21 then we will take it from there.

22 Anything that the government needs to raise?

23 MR. PODOLSKY: No, your Honor.

24 THE COURT: Mr. Avenatti.

25 MR. AVENATTI: No, your Honor.

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1 THE COURT: Thank you.

2 (Jury present)

3 THE COURT: You may be seated.

4 Welcome, ladies and gentlemen. I understand from your
5 most recent note that you have reached a verdict.

6 Let me ask the foreperson, is that correct?

7 FOREPERSON: That is correct.

8 THE COURT: Can you please hand the verdict form to
9 Ms. Smallman to hand to me.

10 All right. Members of the jury, I am about to read
11 your verdict, and after I do so, I intend to ask each of you,
12 is this your verdict?

13 In the matter of *United States v. Michael Avenatti*, 19
14 Cr. 374.

15 With respect to Count One, charging the defendant with
16 wire fraud, the jury finds the defendant guilty.

17 With respect to Count Two, charging the defendant with
18 aggravated identity theft, the jury finds the defendant guilty.

19 Signed by all 12 jurors, dated today, 2:32 p.m.

20 I will note for the record that it looks to me and I
21 gather that initially the other box was checked, but all of you
22 have initialed indicating that your verdict is guilty on each
23 count.

24 Let me confirm with each of you that that is correct
25 and that is your verdict.

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1 Juror No. 1, is that your verdict?

2 JUROR: Yes, it is.

3 THE COURT: Juror No. 2, is that your verdict?

4 JUROR: Yes, sir.

5 THE COURT: Juror No. 3, is that your verdict?

6 JUROR: Yes.

7 THE COURT: Juror No. 4, is that your verdict?

8 JUROR: Yes.

9 THE COURT: Juror No. 5, is that your verdict?

10 JUROR: Yes.

11 THE COURT: Juror No. 6, is that your verdict?

12 JUROR: Yes.

13 THE COURT: Juror No. 7, is that your verdict?

14 JUROR: Yes.

15 THE COURT: Juror No. 8, is that your verdict?

16 JUROR: Yes.

17 THE COURT: Juror No. 9, is that your verdict?

18 JUROR: Yes.

19 THE COURT: Juror No. 10, is that your verdict?

20 JUROR: Yes.

21 THE COURT: Juror No. 11, is that your verdict?

22 JUROR: Yes.

23 THE COURT: Juror No. 12, is that your verdict?

24 JUROR: Yes.

25 THE COURT: Jury is unanimous.

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1 Counsel and Mr. Avenatti, is there any reason I cannot
2 dismiss the jury at this time?

3 MR. PODOLSKY: No, your Honor.

4 MR. AVENATTI: No, your Honor.

5 THE COURT: All right.

6 Ladies and gentlemen, this is the moment where I will
7 dismiss you and excuse you from jury service. I am not going
8 to repeat my remarks from the other day since you heard them
9 when I excused or let the alternates go, but let me reiterate
10 my thanks to you. As I said the other day, all of us, the
11 court and the system generally, thank you for your service, for
12 your commitment, for taking time out of your busy lives and
13 schedules to ensure that the system is fair and give a fair
14 trial to both sides, and we all deeply appreciate that.

15 With your excusal from jury service, you are excused
16 from complying with the rules that I have mentioned to you
17 throughout this trial. Which is to say you are free to
18 research the case, to Google the case, to read anything you
19 want about the case. You are also free to talk to anyone you
20 want about the case. I want to mention a couple of things in
21 that regard.

22 First, given the nature of this case, it's fair to say
23 that there is some press interest. It is up to you if you want
24 to speak to the press, but I would strongly encourage you and
25 urge you to think hard about whether you want to do that. If

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1 you do that, I would strongly and firmly request that you
2 respect the privacy of the jury's deliberations, that you talk
3 about what happened in the courtroom, but you not talk about
4 what happened in the jury room. In my view, that is between
5 the 12 of you, and it should be kept private, you should
6 respect the privacy of your fellow jurors and you shouldn't
7 share that with anyone. So I would urge you to abide by that
8 guidance.

9 I would also urge you not to necessarily speak to the
10 parties -- I am going to speak to them about that as well --
11 should they wish to speak with you, again, for the same
12 reasons. Your verdict is your verdict. What happened in the
13 jury room happened among the 12 of you, and you should respect
14 the privacy of that process. The jury system has served this
15 country pretty amazingly well for over 230 years and there is a
16 lot to be said for it. So I think a lot of respect for it is
17 owed by you, by the press, and by the parties here.

18 With that, I thank you. I wish you a safe travel
19 home. I wish you safe and wonderful weekends. You are excused
20 from your jury service. And thank you very much. Stay safe
21 and healthy.

22 (Jury excused)

23 THE COURT: You may be seated.

24 All right. First, with respect to the issue of
25 contact with jurors, let me say that neither side is to contact

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1 any juror without providing notice to the other side and
2 getting permission from me. So you are not to do it, unless
3 you have my permission and you have given notice to the other
4 side.

5 I need to await Ms. Smallman to give a sentencing
6 date.

7 What is the government's position on bail?

8 MR. PODOLSKY: Your Honor, we have discussed the
9 matter with the defense and would jointly propose that the
10 defendant surrender himself this coming Monday by 5 p.m. to the
11 marshals in the Central District of California. We think based
12 on the assurances that we have been provided by the defense and
13 that agreement, we are comfortable with him staying out until
14 that time, but no later.

15 THE COURT: All right.

16 Mr. Avenatti.

17 MR. AVENATTI: Agreed, your Honor.

18 THE COURT: All right. So I will order that Mr.
19 Avenatti surrender to the marshals in the Central District of
20 California no later than 5 p.m. California time on Monday,
21 February 7.

22 As I said, I am awaiting Ms. Smallman, but since she
23 seems to be occupied, let me give you a sentencing date myself.

24 I would put it down for Tuesday, May 24, at 3:45 p.m.
25 Government.

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1 MR. PODOLSKY: We are available, your Honor, and we
2 think that date makes sense.

3 I do want to flag that based on what the defense has
4 told us, there is a currently scheduled trial date in the
5 Central District of California for May 10. They may be able to
6 speak better to this. My understanding, however, is that there
7 is a pending appeal out there and it's a little bit of anyone's
8 guess as to whether that date will hold. So we would propose
9 to stick with this date for now, although maybe the defense has
10 a different view. But that would be our proposal.

11 THE COURT: Mr. Avenatti.

12 MR. AVENATTI: Your Honor, I am not opposed to that
13 date at this time. The trial that is set in early May, it's
14 unclear as to whether that's a firm date or not in light of the
15 pending Ninth Circuit appeal, so I am certainly not opposed to
16 the May 24th date.

17 THE COURT: For now I will put it down for May 24th at
18 4 p.m., subject to change, obviously, if that doesn't work for
19 some reason. I am not going to interfere with a trial date in
20 California. The parties should just advise me and we will
21 adjust it accordingly.

22 I would assume that the government will be in touch
23 with Ms. Clifford in the event that she wishes to submit
24 something either in writing or to be heard. In accordance with
25 her rights, you should certainly let her know, and let me know,

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1 particularly if it may have a bearing on how long the
2 proceeding may be. All right?

3 MR. PODOLSKY: We will, your Honor. We think that it
4 is likely that she will wish to speak, and I am sure submit
5 something, but we will be in touch and confirm with the Court
6 so that you can be prepared.

7 THE COURT: All right. Anything else from the
8 government?

9 MR. PODOLSKY: Not at this time, your Honor.

10 THE COURT: Anything else from Mr. Avenatti?

11 MR. AVENATTI: Yes, your Honor. I would like to
12 reserve my Rule 29 motion and also have some additional time,
13 30 days, please.

14 THE COURT: I will give you 30 days to make any
15 post-trial motions.

16 Any objection from the government?

17 MR. PODOLSKY: No, your Honor.

18 THE COURT: That's fine. 30 days.

19 Question. Do you want to take a look at the jury
20 verdict? I will be docketing it, but I will redact the jurors'
21 signatures and also the initials that appear on page 1. I
22 could also provide it to the parties by e-mail so that you have
23 it, with the understanding that it's not for public release.
24 The public version will have the redactions.

25 MR. PODOLSKY: That will be fine, your Honor.

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1 THE COURT: Mr. Avenatti.

2 MR. AVENATTI: Yes, your Honor. That's fine.

3 THE COURT: Thank you very much. I wish everybody a
4 pleasant weekend. Stay safe and healthy.

5 The matter is adjourned. Thank you.

6 (Adjourned)

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